UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Uban Development, on behalf of Michael Nymoen, Beckie Nymoen, Lindsay Nymoen, John Nymoen, and Katie Nymoen, Charging Party, v. Karl and Elizabeth Pfaff, Respondents.	HUDALJ 10-93-0084-8 Dated: October 27, 1994

Timothy W. Carpenter, Esquire
For the Respondents

John H. VanderMolen, Esquire
Monica M. Little, Esquire
For the Secretary and the Complainants

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed on November 10, 1992 and amended January 22, 1993 by Beckie Nymoen and Michael Nymoen on behalf of themselves and their three minor children ("Complainants"). (S 1[1]) The complaint was

[1] The transcript of the hearing is cited with a capital T and a page number. The Secretary's exhibits are identified with a capital S and an exhibit number; those of the Respondent are identified with an R.

filed with the U.S. Department of Housing and Urban Development ("HUD") and alleges violations of the Fair Housing Act, 42 U.S.C. §§ 3601*et seq*., as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 120 Stat. 1626 (1988) ("Fair Housing Act" or "Act") based on familial status.[2] It is adjudicated in accordance with § 3612(b) of the Act and HUD's regulations that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

On March 9, 1994, following an investigation of the allegations and a determination that reasonable cause existed to believe that discriminatory housing practices had taken place, HUD's Regional Counsel for Region 10, in Seattle, issued a Determination Of Reasonable Cause And Charge Of Discrimination against Karl and Elizabeth Pfaff ("Respondents"), the owners of the subject property, alleging that they had engaged in discriminatory practices on the basis of familial status in violation of §§ 804(a) and (b) of the Act, which are codified at 42 U.S.C. §§ 3604(a) and (b), and are incorporated into HUD's regulations that are found at 24 CFR 100.60 and 100.75 (1989). A hearing was conducted in Bellingham, Washington on May 17 and 18, 1994, and the parties were ordered to submit post-hearing briefs by July 27, 1994. The parties timely submitted their briefs, and this case therefore became ripe for decision on this last named date.

Findings of Fact

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[2] The term "familial status" is defined in the Act, at 42 U.S.C. § 3602(k), as

> ... one or more individuals (who have not attained the age of 18 years) being domiciled with --
>
> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

At the time of the hearing, Complainant Michael Nymoen resided at 242 Stable View, Bellingham, Washington. (T 93). He is self-employed as an electrical contractor and draws about $800 per week in salary. (T 93-94). Also at the time of the hearing, Complainant Beckie Nymoen was living at 16 Lost Lake Court, Bellingham, with the couple's three minor children.[3] (T 41). In May 1992, she was employed earning minimum wage plus tips at the Lummi Casino. (T 15). Since December, 1993, Mrs. Nymoen has held a second job at Affordable Lighting, where she works on a commission basis that yields her $10 to $15 per hour. (T 15, 64, 69). The Nymoens separated in July, 1993. (T 90).

In July, 1991, the Nymoens executed a month-to-month lease and took up residence in a three-bedroom house on Oregon Street in Bellingham. (T 38). This house consists of about 1300 square feet of living room. (T 18). A few months later, the owners decided to sell the house, but it did not sell for nearly a year. In May, 1992, the Nymoens' landlord informed them that the house was sold and that they would have to vacate it by June 1, 1992. (T 19).

Upon learning that the family would have to move, Beckie Nymoen began looking for another house that would suit their needs. The Nymoens wanted to live in an area known as Sudden Valley because it would be close to most of Mr. Nymoen's work and because it had a number of amenities, such as a pool and a nice wooded area, that would provide a nice environment for the children. (T 19). They agreed that a three-bedroom house, with garage, in the range of $800 to $900 rent would be suitable. (T 19). A garage was a necessity for the Nymoens since Mr. Nymoen keeps his tools and supplies in his work truck. (T 96).

Mrs. Nymoen read newspaper advertisements and contacted 16 realty and property management companies. (T 21; G 3). One of these companies was Sun Mark Properties, Inc., a real estate and property management company. (T 146). Mrs. Nymoen spoke with Bev Talley of Sun Mark. (T 23). Ms. Talley only knew of two 3-bedroom houses available on a rental basis in Sudden Valley in the Nymoens' price range. (T 78). She showed both of them to Mrs. Nymoen. (T 24).

The first house Ms. Talley showed to Mrs. Nymoen was partially furnished and did not have a garage. (T 24-25). The second house, at 5 Basin View Court, was the

[3] At the time of the hearing, the Nymoens' children, Lindsey, John, and Katie, were eleven, nine and seven years of age, respectively. (T 16) Thus, at the time of the events of this case, they would have been approximately nine, seven, and five years old.

subject of this proceeding, a three-bedroom house in Sudden Valley owned by Respondents Elizabeth and Karl Pfaff. (T 25). Ms. Jamie Donnelly was the Sun Mark realtor who had listed the subject dwelling. She was familiar with the house because her brother had built it. (T 147, 148). She had been in the house and knew that it had three bedrooms and two bathrooms. (T 148). The Sun Mark listing showed the house to have three bedrooms, two bathrooms, and a two-car garage, and that the rent was $850 per month. (G 7). It contains approximately 1200 square feet of living space. (G 8, 12).

When Mrs. Nymoen inspected the house, she noted that it was newer than others in the development. (T 25). She noted the three bedrooms, an eat-in kitchen, which she particularly liked, a living room, a dining room, two bathrooms, a "nice-sized" deck off the back, and an attached two-car garage. (T 25). The youngest Nymoen, Katie, went with her mother to view the house. (T 26). Once she had viewed the house, Mrs. Nymoen told Ms. Talley that she would take it. (T 25).

That evening, Mr. and Mrs. Nymoen filled out an application for the subject dwelling and gave it and a deposit of $105 to Mrs. Talley.[4] (G 10). The whole family then went to see the house that Mrs. Nymoen had agreed to rent so that Mr. Nymoen and the other children could see their prospective new home. (T 26). They were not able to go inside, but they were able to walk around and look through the windows. They all agreed that it was a very suitable house and that they would like to live there. (T 26).

The Nymoens' credit check was completed by May 7, 1992, and showed the Nymoens to be a good credit prospect for renting the house. (T 162; G 10). Ms. Talley then contacted Mr. Pfaff to tell him that she had a prospective tenant for the subject dwelling. She told him about the Nymoen family, their employment, their previous residences, and other background information. (T 400; G 10). Mr. Pfaff asked for and was given the ages of the children. He told Ms. Talley that he thought the house might be too small for the Nymoens, but that he would check with his wife and call her back. (G 10).

The following day, Mr. Pfaff called Ms. Talley and told her that he and his wife thought the house was too small for the Nymoens. (G 10). Ms. Talley told him that she felt the family was very nice and would take care of the house. She suggested that the Pfaffs meet with the Nymoens, but he refused. (G 10). The Pfaffs also refused to allow

[4] Five dollars of the deposit was for a non-refundable credit check fee. (G 10).

the Nymoens to present their credit history, which was good, and their history of good tenancy and proper maintenance of the rental houses they had occupied in the past. (T 52; 400-2).

After refusing to rent to the Nymoens, Mr. Pfaff met with Ms. Talley and Ms. Donnelly. (T 152-54; G 10). The purpose of the meeting was to discuss Sun Mark's continued listing of the subject dwelling. (T 152). Sun Mark believed that the Nymoens should have been able to rent the Pfaffs' house. (T 152). During the meeting, Ms. Talley told Mr. Pfaff that he may have violated the Fair Housing Act by refusing to rent to the Nymoens and that his occupancy standard for the property was possibly discriminatory as well. (T 404). His response was that since the property belonged to him and his wife, they could decide who to take as a tenant. (T 404). Ms. Donnelly responded that Sun Mark could not discriminate on how many people live in a home. (T 154). Mr. Pfaff said that he could not deal with a company that continued to pressure him to rent to a family of five, and he tore up the listing contract. (T 404).

After canceling their contract with Sun Mark, the Pfaffs placed an advertisement for the subject dwelling in a local newspaper. (T 405). It was quickly rented to a family of four on about May 23, 1992. (R 3). The lease was for 24 months at $850 per month. (R 3).

After this episode, Mrs. Nymoen resumed her search for housing. She felt pressured because she and her family were required to vacate the Oregon Street house by the end of May. (T 40). She soon found a 3-bedroom house, in an area other than Sudden Valley, at 16 Lost Lake Court. The rent for this house is $975 per month. (S 4).

The House on Lost Lake is of two stories with three bedrooms and two bathrooms on the top floor. (T 43). On the ground floor, it has a kitchen, a dining room, laundry room, and a half bath. (T 44). The house has an attached two-car garage and a finished basement. (T 44). Soon after the Nymoens rented this house the basement started flooding. Because of this, and the fact that the basement is not well heated, the family is unable to make much use of the finished basement. (T 53, 88).

The Nymoens were not able to move into the Lost Lake house by the date they needed to be out of the Oregon Street house because the then current tenants could not close on the house they were buying in time. (T 53). After one extension of their departure date, the Nymoens moved into the Lost Lake house by allowing the previous tenants to store all their furnishings in the garage. (T 45). Because of the delay in possession of the house, the Nymoens were required to move quickly and had to rent a truck to do so. (T 46). Had they not been delayed and then rushed to move, Mr. Nymoen would have moved the family's possessions over a longer, more leisurely period by using

his own trucks. (T 102-3; S 6).

Respondents' refusal to rent their house to the Nymoens caused the family appreciable emotional distress. After looking at the subject dwelling, the family felt that it would meet their desires and that they would like living in it and in Sudden Valley. (T 26). Mrs. Nymoen felt angry after being denied the housing of her choice. (T 51). She did not feel the issue was resolved by moving into another house. (T 51-56). The fact that they had been denied on the basis of the number of people in their family made both Nymoens feel "... very angry and upset;" Mrs. Nymoen's feelings "...just kept popping up all the time." (T 59). She had never experienced discrimination directed towards her personally prior to this episode, and she found it to be a "rude awakening." (T 65). It was a difficult experience for her, which she described as:

> "... just a terrible feeling. You feel--it's hard for me to explain how a person--you feel. I can't. It's hard for me to put it into words. It's--it's degrading. It's making--your making choices that you can't make against a person. I don't know. It's not a good feeling." (T 65).

Michael Nymoen felt "... anger, frustration, disbelief." He could not "... believe people still discriminate." He had experienced discrimination when he returned from serving in Vietnam. (T 110). The feelings he experienced after being rejected for the housing of his choice were "pretty close" to the feelings he had experienced when he returned from the war. He described how he felt:

> "Not good. It makes you feel like you're not really a functioning person. It's like you don't have a say in what you do anymore; somebody else is now in control of your life and to hell with you." (T 110).

Mr. Nymoen's interactions with his family changed after the family was rejected as tenants. He felt that "... things just didn't matter anymore." (T 111). His daily activities and interactions with his family "... just kind of went away." Prior to this episode, Mr. Nymoen thought that he had a "... normal functioning family ..." and that he was "... doing the right thing ..." in terms of how he related to the other family members and his own family role. To him, the "right thing" was:

> "... you get married, you have kids, you have the right amount of kids, you know, the American [way], and then someone comes along and says, 'Uh, uh, you can't have that. You are not entitled to have three children.' That's--it didn't sit well." (T 111-12).

After the episode with the Pfaff house and the family move to the Lost Lake house, Mr. Nymoen spent less time with his children than he had before. (T 112). Mrs. Nymoen noticed a change in her husband's interactions with their children. (T 60). Prior to these incidents, Mr. Nymoen would do things with his children, like playing ball or with a frisbee. (T 60). After the incident, according to Mrs. Nymoen, he "... just worked. When he came home he was tired and he wanted to sit and watch TV, and he wanted it quiet." (T 60).

The stresses in the Nymoen family that originated with their being rejected for the Pfaff house contributed to the deterioration of the couple's marriage and their eventual separation. (T 91, 117). Michael Nymoen states that he "emotionally changed" as a result of the incident. His experience was that his "... feelings were gone; everything; everybody I was dealing with; it was with animosity. I just basically didn't give a damn." (T 117). Mr. Nymoen's animosity was directed toward everyone, including his family. (T 117).

In addition to experiencing change in their father's behavior towards them, the Nymoen children were confused by the fact that their family couldn't live in the house they had seen and liked. (T 50). When Mrs. Nymoen began calling to look for another house, the children wanted to know why they had to look for another house when they had liked the one they had seen. (T 50). Mrs. Nymoen had to explain to the children that their family had been turned down because the owners felt that their family had too many people for the house. (T 50). The children did not understand this because the previous two houses that they had lived in had the same number of bedrooms as the subject dwelling. (T 50).

The Pfaffs' house has three rooms that are suitable for use as bedrooms. Two of these rooms are designated as bedrooms on the architect's floor plan drawing. (S 8). The third room, which is labeled "den" on the drawing, is the same size, at approximately 10' X 10', as one of the other bedrooms, and it contains the same size, large closet. (S 8). This room was being used as a bedroom when the HUD investigator conducted her inspection of the house. (T 203-204).

The respondents did not base their occupancy standard on any engineering study to determine whether the physical layout and support systems could support five persons. (T 399). Indeed, the living space of the house and its mechanical systems are more than adequate for a group of five persons. (T 343, 397, 409-10). Moreover, there are no state, county or township occupancy policies or laws limiting the number of people that can reside in a single-family dwelling. (T 382).

The Pfaffs are from Germany. (T 312-16). After World War II, they emigrated to Canada. (T 317). When they arrived in Canada they initially lived with their two minor

children in a rented room in a house. Mr. Pfaff does not believe that it was unreasonable for his family to occupy one room during this time. (T 318). The Pfaffs later came to the United States; first to Tennessee, and later to Washington. (T 320).

Respondents have been in the business of renting single family houses that they own in Bellingham, Washington, since 1970. (T 323). The eight homes that they own in that area are worth approximately $1 million. Only one of the houses is still mortgaged. (T 395-6).

According to March, 1992 U.S. census data, 87.68% of the five-person households in the United States include children under the age of eighteen. (T 257; S 14 Table I). The family characteristics of Whatcom County closely match the national family characteristics. (T 253, 259, 261; S 14 Tables III and IV). Based on this national data, an occupancy policy which limits a dwelling to no more than four persons will impact 24.3% of families with children under 18 as compared to 3.63% of families without children under that age. (T 263; S 14 Table II).

A survey of the Bellingham area conducted by HUD's Regional Economist shows that the vacancy rate for single family houses offered for rent in the spring of 1992 was close to zero. (T 272; S 13). According to 1990 census figures for the county, there were 17,948 three-bedroom single-family units. Of this total, 14,685 (82%) were owner-occupied. Of the 17,300 rental units in the county, 3,263 (19%) have three bedrooms; only 881 (5%) have four bedrooms. (S 15).

Applicable Law

The Fair Housing Amendments Act took effect on March 12, 1989. Since then, the codification found at 42 U.S.C. § 3604(a) has made it unlawful

> ... to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... familial status ...

The Act, at 42 U.S.C. § 3604(b), also prohibits the making of

> any statement ... with respect to ... rental of a dwelling that indicates any ... limitation ... because of ... familial status ...

During its consideration of the 1988 Amendments Act, the House of Representatives noted that a number of jurisdictions already had in place limitations on the number of people who could occupy a unit "based upon a minimum number of square feet in the unit or the sleeping areas of the unit." H.R. No. 711, 100th Cong., 2d Sess. 31 (1988). The debating Members also recognized that housing providers could circumvent the prohibition of discrimination on the basis of familial status, without so much as mentioning children, simply by limiting the number of "people" or "individuals" who could occupy a sleeping area or apartment. The Act, therefore, struck a balance between the need to maintain building code standards for health and safety reasons, and the pressing need of families with children to obtain decent housing by stating specifically that the prohibition on familial status discrimination is not intended to limit "the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1).

In addition, Congress recognized that the capacity of rental housing can vary widely, even among units that have the same number of bedrooms. Congress did not intend that owners or managers of housing could not in any way restrict the number of occupants per unit. As a result, neither the legislative history nor the Act itself supports the establishment of any sort of "national occupancy code" beyond existing reasonable and nondiscriminatory governmental limits.*See*, 24 CFR Ch. 1, Subch. A, App. 1, p. 693 (1991) (p. 547 (1989)). Therefore, HUD interprets § 100.10 Exemptions of the Act to permit owners and managers of housing to develop and implement, in appropriate circumstances,

> reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit.*Id.*

However, while HUD decided that the implementation of some privately-developed occupancy restrictions in privately-owned housing is permissible, it also issued a plain warning that it would

> carefully examine any such nongovernmental restriction to determine whether it operates unreasonably to limit or exclude families with children*Id.*

Discussion

In the absence of direct evidence of discrimination, violations of the Fair Housing Act can be proven by circumstantial evidence under either a disparate treatment or adverse impact analysis, both of which have been traditionally applied to cases involving

other forms of discrimination. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1401 (D. Minn. 1990), *aff'd.*, 923 F.2d 91 (8th Cir. 1991). The disparate treatment analysis is actually one of intentional discrimination. Both theories of discrimination are established through a process of shifting burdens of proof.

HUD's Chief Administrative Law Judge, Alan W. Heifetz, stated the burden of proof test to be applied in housing discrimination cases brought under the Fair Housing Act in *HUD v. Blackwell*, Fair Housing - Fair Lending (P-H) para. 25,001 at p. 25,005 (HUDALJ No. 04-89-0520-1, Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990) (hereinafter cited as *Blackwell*); *Pinchback v. Armistead Homes Corp*, 907 F.2d 1447, 1351 (4th Cir. 1990), *aff'd*, 689 F. Supp. 541 (D. Md. 1988), *cert. denied*, 111 S. Ct. 515 (1990). This statement of law is that the well-established three-part test that is applied by the federal courts to employment discrimination cases which are brought under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should also be applied to housing discrimination cases that are brought before this forum. *See, e.g., Politt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1989). *See also*, R. Schwemm, *Housing Discrimination Law*, at 323, 405-10 & n. 137 (1983). That burden of proof test is as follows:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence ... Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, undiscriminatory [sic] reason" for its action .... Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact pretext ....

Politt, supra, at 175, *citing McDonnell Douglas, supra*, at 802, 804.

The shifting burden of proof format from *McDonnell Douglas*, which is spelled out above, is designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984), citing *Loeb v. Truxton, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (disapproved on other grounds in *Trans World Airlines, Inc., supra*). Therefore, it was further established in this forum that where Complainant and the Government can produce direct evidence of intentional discrimination, the shifting burdens of proof analysis set forth in *McDonnell Douglas* need not be applied. *HUD v. Murphy*, Fair Housing - Fair Lending (P-H) para. 25,002 (HUDALJ No. 02-89-0202-1, July 13, 1990) at 25,018, *citing Trans World Airlines, supra*, at 121; *see also Teamsters v. U.S.*, 431 U.S. 324, 358, n. 44 (1977). In this case, there is no direct evidence of discrimination.

Therefore, this discussion must include the seeking of proof of discrimination by the application of the three-part test to the circumstances.[5]

Furthermore, since the allegation in the instant case is not one of intentional discrimination, but, rather, one charging a discriminatory impact, the three-part test described above must be modified. Once the respondents are faced with a *prima facie* showing of discriminatory impact, they have the burden of articulating more than just a legitimate non-discriminatory reason for the challenged practice. Their burden rises to the need to prove a business necessity sufficiently compelling to justify the challenged practice. *Williams v. Colorado Springs School District #11*, 641 F.2d 835, 842 (10th Cir. 1981); *Griggs v. Duke Power Co*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

This compelling business necessity formulation is frequently applied in employment discrimination cases. *See, e.g., Wright v. Olin Corporation*, 697 F.2d 1172, 1188 (4th Cir. 1982); *Robinson v. Lorillard*, 444 F.2d 791, 798 (4th Cir. 1971). In a Decision and Order remanding an initial decision issued by this forum, the secretary unequivocally adopted this standard for use in Fair Housing cases. *HUD v. Mountain Side Mobile Estates*, 2 Fair Housing - Fair Lending (P-H) ¶25,064, p. 25,619 (HUD Sec'y. Oct. 20, 1993)("*Mountain Side II*").

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[5] Respondents claim that since they were always prepared to rent their houses to families with children, they cannot be guilty of denying housing on the basis of familial status or any other basis. However, the issue is not whether any housing would be provided if available, but rather, whether the Nymoen family was denied the housing it sought.

The elements for making out a prima facie case "are not fixed." *Pinchback* at 549. Rather, they vary from case to case, depending upon the allegations and the circumstances. Thus, in this case, to establish a prima facie case under the theory of adverse impact, which alleges a discriminatory effect from a facially-neutral policy, the Secretary must identify the challenged policy and the discriminatory effect. The Respondents then have the burden of justifying the use of the policy for reasons that constitute "compelling business necessity." *Mountain Side II*.[6] If the Respondents are able to state a justification for the policy, the burden is back on the Secretary to rebut the Respondents' claim of compelling business necessity or he may demonstrate that alternative policies that accomplish the same goal minimize the adverse impact on the classes of people protected by the Act.

Refusal To Rent/Unlawful Limitation

Under the theory that adverse impact establishes a presumption of discrimination, it is not necessary to make a showing of intent. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2nd Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). Therefore, where a housing provider employs a facially-neutral practice which has an adverse impact on a protected class of people, that practice is "fair in form, but discriminatory in practice," and a violation of the Act is presumed to have occurred. *See, Griggs v. Duke Power Co*, 401 U.S. 424, 431 (1971) (Title VII); *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984) (Title VIII). So, the Secretary's initial burden is to identify a practice, which is the subject of the complaint, that causes a discriminatory effect. *See Betsey*, at 988; *cf. Wards Cove Packing Co., Inc. v. Antonio*, 109 S. Ct. 2115, 2124-25 (1989) (Title VII).

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[6] This standard was first set forth in this forum in *HUD v. Riverbend Club Apartments*, Case No. 04-89-0676-1 (Initial Decision HUDALJ Oct.5 1991). However, the Initial Decision was superseded by an Initial Decision and Consent Order (Nov. 14, 1991).

The Respondents in this case enforce a facially-neutral policy in the form of an occupancy restriction stated in terms of number of "people" or "individuals" that they would permit to occupy the subject dwelling. They have maintained throughout this proceeding that the policy makes no distinction between families with children and groups of unrelated adults and that the applicability of the policy is determined by the number of prospective residents, not their age or relationship. However, the reality is that the adverse effect of such a policy is borne by families with children, such as the Nymoens. Evidence adduced during the hearing showed that the Nymoens could not rent the house of their choice based upon family size, while there was no evidence of corresponding exclusions of unrelated adults or other family groupings. (S 6).[7]

[7] "Unrelated adults" is not a protected class under the Act.

This adverse impact may also be more explicitly demonstrated by statistical evidence. *Betsey, supra; Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 154-55 (S.D.N.Y. 1989); *cf. Wards Cove, supra*, at 2121-25 (Title VII). More recently, in a Decision And Order, the secretary stated the burdens and standards of proof to be used in adverse impact cases. *See HUD v. Mountain Side Mobile Estates*, 2 Fair Housing - Fair Lending (P-H) ¶25,053 (HUD Sec'y. July 19, 1993)("*Mountain Side I*").[8] He determined that evidence of discriminatory effect is sufficient to establish a *prima facie* case of discrimination under the Act. *Id.* at p. 25,492. However, he also determined that absent a showing by the respondents of a significant variation between national and local statistics regarding the size and composition of families, national statistics may be applied to a particular locality. *Id.* at p. 25,493. Finally, the secretary determined that to rebut a *prima facie* showing of adverse impact, respondents must show that the policy at issue is required by "business necessity." *Id.* at p. 25,493. Later, as noted above, he applied a standard that is "akin to constitutional strict scrutiny"[9] by further stating that to meet the "business necessity" standard, the respondent must show use of the least restrictive means to achieve a compelling business necessity. *See Mountain Side II* at p. 25,619.

In the instant case, the secretary presented statistical data showing the composition and size of households in the United Sates. (G 14). These data show that 87.68% of the households with five persons in the United States have children under eighteen years of age included in the household. (G 14, Table I). The secretary also showed that Whatcom County, Washington, the locale of the subject dwelling, closely mirrors the national family statistics. (T 253, 259; G 14 Tables III and IV). The national statistics further reveal that 24% of families with children would be impacted by an occupancy limitation of no more than four persons. (G 14 Table II). This compares to only 3.63% of families without children being impacted by such a policy. Finally, because of the comparability of the Whatcom County family statistics to the national statistics in G 14, Table IV, I find it likely that the adverse impact of an occupancy limit of no more than four persons would be the same for Whatcom County as it is nationally and that this adverse impact would fall disproportionately on families with children. The Nymoens, members of the

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[8] The Second Initial Decision On Remand And Order (P-H ¶25,057) that was issued by this forum as a result of *Mountain Side I* was also remanded in a Decision And Order issued by the Secretary, *HUD v. Mountain Side Mobile Estates*, 2 Fair Housing - Fair Lending (P-H) ¶25,064 HUD Sec'y. Oct. 20, 1993)("*Mountain Side II*"). The Third Initial Decision On Remand And Order that was issued by this forum as a result of *Mountain Side II* is now pending appeal along with *Mountain Side I and II* (10th Cir. 94-9509).

[9] *Fair Housing Counsel v. Ayers*, Fair Housing - Fair Lending (P-H) ¶15,931, p. 15, 931.3 (C.D. Calif. Jun. 16, 1994).

protected class known as "persons with familial status," were treated differently from other people because of their membership in that protected class.

Since the Government has met its burden of identifying a practice that causes an adverse impact on a protected class the analysis turns now to the Respondents' justification for the practice. As stated above, Respondents must demonstrate a "compelling business necessity" for using the challenged practice *See Betsey, supra,* at 988 (the inquiry is "whether ... a compelling business necessity exists, sufficient to overcome the showing of disparate impact ..."); *see also Huntington, supra,* at 939; *cf. Wards Cove, supra*, at 2125-27 (Title VII).

Respondents did not refute the statistical data presented in the hearing, nor did they contradict the implications of it.[10] Instead, they tried to justify it by stating that their goal was to maintain the economic value of the property.[11] Nonetheless, they refused to look at the Nymoens' good credit rating, history of good tenancy including good maintenance, and the fact that they had actually made improvements in earlier tenancies.

The respondents' proffered business interest is extremely weak and not bolstered by any evidence. There is no evidence that the Nymoens, nor any other family of five persons, would have degraded the economic value of the house. Respondents have not cited authority to show that such economic judgments constitute compelling necessity, nor have they produced evidence to demonstrate that the occupancy limit they imposed was closely tailored to serve its goals. They simply rely upon their own subjective judgment which, notwithstanding their experience in real estate, falls short of the necessary showing. *See Fair Housing Counsel v. Ayers*, Fair Housing - Fair Lending (P-H) ¶15, 931, p. 15,931.3 (C.D. Calif. Jun. 16, 1994).

Even if Respondents' damage prevention rationale were supported by independent evidence, they do not show that the occupancy restriction is the least restrictive means to achieve their purpose. They did not, for example, consider alternatives such as detailed

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[10] I take Respondent's counsel's stipulation that the Respondent's occupancy standard has a potential effect on families with children that is greater than it's effect on families without children to be mere courtroom error. (T 264-65).

[11] They also claimed that the third bedroom was actually a den because it is so labeled on the house blue print. However, they themselves advertised the house as a three-bedroom rental, and they did not know about the den label until after the complaint was filed. This room was found to be no different from the other bedrooms in that it was the same size as one of them and contained the same size clothing closet. Moreover, I take notice that a room is only a den if the occupants so name it and use it like a den.

maintenance requirements, more frequent inspections, higher security deposits, or more careful tenant screening. Thus, I find that the respondents' attempt to justify their policy by stating a business interest falls far short of the high standards articulated by the secretary in his two *Mountain Side* Decisions. It fails as a "legitimate, nondiscriminatory reason" for implementing the respondents' occupancy limit because it is not a "compelling business interest" achieved by the least restrictive means possible.

Statements of Preference or Limitation

The Act's prohibition against discriminatory statements is not limited to written statements. Any statements which express a prohibited preference, limitation, or discrimination were found within the purview of the Act in *HUD v. Denton*, 2 Fair Housing - Fair Lending (P-H) ¶25,024, 25,281 (HUDALJ Feb. 7, 1992); *See also*, 24 CFR 100.75. To this I would add that, to be unlawful in accordance with this provision of the Act, the prohibited expressions of preference must be made by an owner, manager, or other person with the power to actually prevent another's acquisition of housing *e.g.*, a real estate agent. *HUD v. Gutleben*, (HUDALJ 09-92-1893-1 Aug. 15, 1994).

A statement by an owner or other person with authority violates the Act if an ordinary person would interpret the statement to be discriminatory *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972). In the instant case, although Respondents attempt to couch their statements in terms of "too many people" rather than "too many children," it is clear that when applied to the Nymoen family, Respondents' statements were intended to mean the latter. This is shown by the fact that both real estate agents considered the Pfaffs' statements and reasons for choosing not to rent to the Nymoens as probably in violation of the Act. This is what prompted them to arrange a meeting with the Pfaffs to discuss continuation of Sun Mark's involvement in the listing of the subject dwelling. (T 152; G 11).

Statements which link the size of an available dwelling to the size of a prospective tenant's family can be determined to be in violation of the Act *HUD v. Wagner*, 2 Fair Housing - Fair Lending (P-H) ¶25,032 at p. 25,336 ("the apartment isn't large enough for kids"); *HUD v. Kelly*, 2 Fair Housing - Fair Lending (P-H) ¶25,034 at p. 25,358 (statement that Complainant had "one child too many"). Here, when the real estate agent described the Nymoen family to Mr. Pfaff, including responding to his inquiry regarding the ages of the children, Mr. Pfaff told her that he felt the subject dwelling was too small. (G 10). The following day, Mr. Pfaff again told the agent that he and his wife thought the subject dwelling was too small. (G 10). Clearly, when Mr. Pfaff made these statements he was fully aware of the fact that the Nymoen family consisted of two adults and three minor children between the ages of nine and five. Thus, it is reasonable to conclude that Respondents' statements were reasonably interpreted by the Nymoens and the real estate agents as indicating a limitation based on the number of children in the family *i.e.*, their

familial status.

Ultimate Conclusions

The occupancy standard implemented by the Respondents had the effect of limiting the number of children and, it follows, the number of families with children, that could move into their rental unit. Furthermore, this policy treated people with familial status differently from families without children. The respondents made the statements that established and implemented the limitations that had the effect of discriminating against the complainants.

More specifically, by refusing to make a three-bedroom rental unit available to the complainants because of their familial status, Respondents have violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. § 3604(a) and HUD's regulations that are codified at 24 CFR 100.50(b)(1) and 100.60(b)(2). By setting and enforcing an unreasonable occupancy standard, Respondents have discriminated against families with children with respect to the rental of a dwelling in violation of the provisions of the Fair Housing Act that are codified at 42 U.S.C. § 3604(c) and HUD's regulations that are codified at 24 CFR 100.50(b)(4) and 100.70. Thus, the Secretary has established both violations of the Fair Housing Amendments Act that were alleged in the Determination Of Reasonable Cause And Charge Of Discrimination that commenced this action.

Remedies

Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or equitable relief." 42 U.S.C. § 3613(g)(3). That section further states that the "order may, to vindicate the public interest, asses a civil penalty against the respondent." The maximum amount of a civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory practices. Where the respondent has not been adjudged to have committed any prior discriminatory practices, any civil money penalty assessed against the respondent cannot exceed $10,000. *See also* 24 CFR 104.910(b)(3) (1990). Otherwise, the maximum allowable civil money penalty is $25,000.

The government, on behalf of itself and the complainant, has prayed for: (1) an award of $3,798.61 in damages to compensate Complainants for their out-of-pocket expenses; (2) an award of $30,000 to compensate Complainants for their emotional distress and the effects that it had on their family; (3) injunctive relief to address the public interest in eliminating housing discrimination against families with children and in

educating housing providers about their responsibilities and obligations under the Fair Housing Act; and (4) a civil penalty in the amount of $10,000.

Expenses

The rent for the alternative house the Nymoens ultimately acquired after being rejected by the respondents as renters of the subject dwelling was shown to be $975 per month. (T 43; G 4). The rent for the subject dwelling was $850 per month. Thus, the Nymoens incurred an additional $125 per month in rent as a direct result of Respondents' discriminatory conduct.

Because of the time pressures related to the sale of the Oregon Street house (T 40), and the tight rental market for single family dwellings (T 278-79), the Nymoens' decision to rent the Lost Lake house was reasonable. Therefore, they are entitled to the difference in the two rents for a reasonable period. The time from the discriminatory conduct to the hearing in this matter was two years, and the Nymoens will be awarded $125 per month for 24 months in the Order that follows below to compensate them for their additional expense for rent.

The secretary also seeks the difference of the damage deposits on the two houses. Whereas the deposit for the subject dwelling would have been $850, the deposit the Nymoens paid on the Lost Lake house was $1,100. The secretary argues that the difference in the deposits should be payable from the respondents to the complainants because, even though it was a deposit, the amount "represents real dollars that were not available to them to cover their expense of living." (Secretary's brief, p. 33). If this were appropriate, it would also be appropriate for the Nymoens to pay back this amount when they ultimately receive a return of their deposit, whether in cash or in repairs for which they are responsible. This awkward process is not justified, and therefore the difference in the deposits will not be awarded.

In addition to increased housing costs, the Nymoens are entitled to recover the costs related to their move. *HUD v. Jerrard*, 2 Fair Housing - Fair Lending (P-H) ¶25,005 at pp. 25,000-25, 091 (HUDALJ Sept. 28, 1990). Since the move from the Oregon Street house to the Lost Lake house had to be accomplished in one day, Mr. Nymoen rented a moving van at a cost of $62.61. Had the family been leased the house of their choice they would not have been rushed in their move, and Mr. Nymoen would have used his own, smaller trucks to move the family's belongings over a longer period of time. (T 106). I also note that if the Nymoens had been more affluent, they would have paid for a moving service, and the amount paid for such a service would have been compensable

here. Thus, the Order below will include $300 for the inconvenience of the Nymoens' day of moving plus the cost of the van.

Lost wages may be awarded as an "out-of-pocket" expense in cases brought under the Act. *HUD v. Properties Unlimited*, 2 Fair Housing - Fair Lending (P-H) ¶25,009, p.25,150 (HUDALJ Aug. 5, 1991). The secretary asks that Mrs. Nymoen be compensated in the amount of $136 for the loss of a day's wages because of her need to move from the Oregon Street house to the Lost Lake house. (T 61). Again, had the Complainants been able to move without being rushed, as the case would have been had they rented the subject dwelling, there would not have been the need for Mrs. Nymoen to miss a day's work. Mrs. Nymoen's wages averaged between $10 and $15 per hour, and I therefore find them to be $12.50 per hour for the purposes of this decision. The secretary does not explain why Mrs. Nymoen should be compensated $136 for a day's wages. I will include $12.50 per hour for eight hours, or $100, in the Order below. Mr. Nymoen earned at the rate of $20 per hour and so $160 will also be awarded.[12]

Wages lost due to participation in the hearing are also recoverable. *HUD v. Murphy*, 2 Fair Housing - Fair Lending (P-H) ¶25,002, p. 25,054 (HUDALJ Jul. 13, 1990). The rationale for awarding lost wages and other expenses related to litigation of a housing discrimination complaint is to "... return the victims of discrimination as closely as possible to the condition that they would be in if they had not been subjected to unlawful discrimination ..." *Properties Unlimited*, at p. 25,150. Mrs. Nymoen spent 16 hours preparing for the hearing and another 12 hours in the hearing itself, for a total of 24 hours. Mr. Nymoen also missed a day and a half of work to attend the hearing, which cost him $240. Thus, $590 in hearing-related lost wages will be included in the Order.

Intangibles

The secretary also claims that the complainants have suffered embarrassment, humiliation, and emotional distress as a result of Respondent's actions. In addition to actual damages, a Complainant is entitled to recover for these categories of damage. *See, e.g., Blackwell, supra*, at 25,001; *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Because these abstract injuries are not subject to being quantified, courts have

[12] The secretary does not explain why he did not request compensation for Mr. Nymoen's lost wages. I take this to be oversight for which the Nymoens should not be short-changed.

ruled that precise proof of the actual dollar value of the injury is not required. *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.*, 478 F. 2d 380, 384 (10 Cir. 1973).

The administrative law judge assigned to decide a case of housing discrimination is accorded wide discretion in setting damages for emotional distress, and is guided in determining the size of the award by the egregiousness of the Respondent's behavior and the Complainant's reaction to the discriminatory conduct. R. Schwemm, *Housing Discrimination Law*, 260-62 (1983). Awards for emotional distress in relevant federal case law range far and wide, depending on the circumstances.[13] Therefore, a review of federal cases is not very helpful as guidance here.

However, awards of damages for emotional distress have been made by this forum in housing discrimination cases, and these can be looked to for some guidance. In *Blackwell*, $40,000 was awarded to a black couple for the embarrassment, humiliation, and emotional distress of having been denied a house because of their race. This was a clear case of open and blatant racial discrimination perpetrated by a real estate agent. In *Murphy*, *supra*, awards of $150, $400, $800, $1,000, and $5,000 were made for emotional distress and loss of civil rights, with the award of $150 being made to a party who "... suffered the threshold level of cognizable and compensable emotional distress." (at 25,057). In *HUD v. Guglielmi and Happy Acres Mobile Home Park*, Fair Housing - Fair Lending (P-H), para. 25,070 at 25,079, I awarded $2,500 to the Complainant where I

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[13] *See, e.g., Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983) ($12,402 award for plaintiff's mental anguish, humiliation, embarrassment and stress); *Grayson v. S. Rotundi & Sons Realty Co.*, 1 Fair Housing-Fair Lending (P-H) para. 15,516 (E.D.N.Y. Sep. 5, 1984) (compensatory damage awards of $40,000 and $25,000 for two plaintiffs' embarrassment and humiliation); *Parker v. Shonfeld*, *supra* ($10,000 compensation award for embarrassment, humiliation, and anguish); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982) (allowance of $10,000 to each plaintiff at a time when that court had never before exceeded $5,000). *Cf. Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303 (7th Cir. 1985) (in employment discrimination case, jury award of $75,000 as compensatory damages for plaintiff's mental distress found excessive, and $35,000 awarded based upon the record).

found that the Respondents had "... contributed significantly to [Complainant's] actual and perceived loss of civil rights, feelings of embarrassment and humiliation, and general emotional distress" for the better part of a year, and in *HUD v. Baumgardner*, Fair Housing - Fair Lending (P-H), para. 25,094 at 25,101, I awarded $500 to a young man who had been discriminated against on the basis of sex "because men are messy tenants." He did not appear to be a man of vulnerable constitution, but he said that he was angry, hurt, and frustrated by the denial of the house he wanted and that it was a source of anger and distress for a few months. In *HUD v. Jeffre*, Fair Housing - Fair Lending (P-H), para. 25,020, *et seq.*, I awarded $500 for inconvenience, $1,500 for emotional injury, and $2,500 for loss of housing opportunity to a complainant who had been denied an apartment for herself and a minor daughter on the basis of her familial status. Finally, in *HUD v. DiBari, supra*, I awarded $200 for emotional distress to a woman of strong constitution who had been denied an apartment because of the Respondent's fear of harm to her child from lead-based paint.

Reaction to the Discrimination

The whole Nymoen family was victimized by the respondents' discrimination. Mr. Nymoen testified that prior to the events of this case he believed he had a "normally functioning family." (T 111). He construed Respondents' refusal to rent the subject dwelling to him and his wife as the same as telling him that he wasn't entitled to have three children. (T 112).

Respondents' rejection of the Nymoen family caused Mr. Nymoen to feel as though he was not really a functioning person. (T 110) Mr. Nymoen experienced feelings of anger, frustration and disbelief after Respondents refused to consider his family as tenants for the house. He described himself as having been "emotionally changed" as a result of Respondents' discriminatory actions. These feelings were manifested in a change in Mr. Nymoen's interactions with other people, including and especially his family. (T 117). As he described this problem, his "... feelings were gone; everything, everybody I was dealing with, it was with animosity. I just basically didn't give a damn." (T 117).

Mrs. Nymoen's view of this was that after the refusal to rent, Mr. Nymoen was "more distant." (T 59). He began working seven days per week, and she did not see him much. This previously had not been the case. She also noticed a change in her husband's interactions with the children. (T 59).

Prior to the incident with Respondents, Mr. Nymoen would do things with his

children, such as play ball and frisbee. (T 60). After the rejection, he just worked, and when he came home, he "wanted it quiet." (T 60). Mr. Nymoen also testified that after the failure to rent the house, he spent a lot less time with his children. (T 112). Mr. Nymoen had felt badly treated and discriminated against upon his return from service in Vietnam, and the ill feelings caused by that experience were brought back by the respondents' conduct toward him and his family.

Mrs. Nymoen was also upset by Respondents' rejection of her family as tenants for the subject dwelling. (T 51). Like her husband, the incident made Mrs. Nymoen feel very angry. (T 59). She had difficulty reconciling herself to the fact that her family had been found to be ineligible to rent the subject dwelling. She testified that "... it kept popping up all the time," even though the family had settled in another house. (T 59). The children wanted to know why they could not live in the house the family had selected, and they could not understand why they had been rejected even though they had always lived in a three-bedroom house. Their inquiries and distress further fed the distress felt by Mrs. Nymoen.

The trauma felt by the Nymoen family as a result of the respondents' discrimination against them contributed to Mr. and Mrs. Nymoen's separation in July, 1993. (T 93, 117). Mrs. Nymoen testified that her husband was unable to talk to her about the incident while she thought about it constantly and needed to talk things out. (T 59, 91). She stated that, "He didn't know how to deal with it. He won't talk about it." (T 92).

Egregiousness of the Conduct

As mentioned earlier, in addition to considering the reaction of the aggrieved persons to the respondents' discriminatory conduct, the egregiousness of Respondents' behavior also is a consideration in deciding an appropriate award for emotional distress. *See* Schwemm, *supra*, ¶25.3(s)(c), p. 25-22.

Respondents Pfaff acted in blatant disregard of the Act's prohibition against discrimination based on familial status. After reviewing the Nymoens' credit and rental history, the real estate agent contacted the Pfaffs to let them know that she had found prospective tenants for their house. However after learning from the agent that the Nymoen family included three minor children, the Pfaffs refused to give their application further consideration. The agent attempted to convince Mr. Pfaff that the Nymoens were a nice family who would take care of the house. (G 10). She even suggested that the Pfaffs meet with the Nymoens (G 10). However, the Pfaffs stubbornly maintained their position that they were exercising a property owner's right to refuse to rent to anyone who did not suit them as tenants.

The Respondents persisted in their refusal to consider the Nymoens' application even though the real estate agents advised them that their conduct could be considered discriminatory under the Fair Housing Act. (T 404). In this regard, Mr. Pfaff testified that it was his view that, "This is our own property and we decide who we take." (T 404). Mr. Pfaff dramatized his feelings about a law that would require him to rent to a qualified family not of his choosing by describing how he had terminated his meeting with the two real estate agents who were attempting to dissuade him from his course of conduct. They were counselling him that his conduct was probably not legal and could lead to liabilities. In reaction, he stated, he "... took the [listing agreement with the real estate agency] and tore it up and threw it in their waste paper basket and that was it." (T 404).

The emotional distress, disruption to their lives, and family trauma suffered by the Nymoens as a result of Respondents' unlawful conduct is similar in nature, although perhaps not quite so extreme, as that suffered by the aggrieved family in *Blackwell*. In that case, the family that had been denied the purchase of a house on the basis of their race was awarded $40,000 to compensate them for the emotional distress, embarrassment and humiliation suffered as a result of the reluctant seller's discriminatory conduct. That seller was a real estate agent who obviously knew, or could be expected to know, that his conduct was unlawful.

When Congress added familial status in 1988 to the list of "impermissible characteristics" covered by the Act, it recognized that "... families with children are refused housing despite their ability to pay for it." H.R. Rep. 711, 100th Cong. 2d Sess. 19 (1988), *reprinted in* 1988 U.S. Cong. & Admin. News 2173, 2180 ("House Report"). The House Report also noted the importance of the family in our society:

> Both Congress and the courts have a long tradition of defining and protecting families as "perhaps the most fundamental social institution of our society." The Congress has consistently stressed the importance of the family in numerous social welfare programs intended to support children and their parents. In 1949, the federal government made a commitment to "provide a decent home and suitable living environment for every American family. Nearly 40 years after this commitment, however, discrimination against families with children prevents millions of American families from realizing this goal. (citations omitted).

It is clear from the House Report that by amending the Act in 1988 to add familial status as a protected class, Congress put families with children on a par with other

protected classes who find themselves victimized by discrimination in housing. There is nothing in the Act which suggests that familial status, as a protected class, should be less favored than other protected classes. Discrimination against families with children is as illegal as discrimination against persons on the basis of their race, national origin, or other characteristics.

Like discrimination based on race, familial status discrimination involves an immutable characteristic. In the case of familial status, that immutable characteristic is having one or more minor children.[14] Thus, when the Nymoens learned that they were being denied the opportunity to rent the subject dwelling because they had three children, there was absolutely nothing they could do to make themselves acceptable to Respondents. They could not change the fact that they were parents of three minor children. All they could do was continue their search for housing for themselves and the children. Certainly, the Pfaffs' conduct would be viewed with societal disfavor if they

had told a family that it could not rent a house because of its race. So too should their conduct relative to refusal to rent to a family be viewed with disfavor and sanctioned accordingly.

[14] Although, unlike race, familial status is a characteristic that will pass with time, it is immutable until that time expires.

Respondents' refusal to rent the subject dwelling to the Nymoens, even after learning from the real estate agents that their refusal to do so could be found discriminatory under the Act, evidences an intentional and willful disregard for the law. Because of Respondents' intentional discriminatory conduct, the Nymoens, both as individuals and as a family unit, suffered significant emotional trauma and disruption. To compensate them for this, and in view of the egregiousness of the violation by the Pfaffs, as well as after considering the awards for emotional distress that were discussed above, $20,000 will be awarded to the Nymoens in the Order that follows.[15]

Civil Penalty

The maximum penalty that may be imposed upon a respondent who has not been adjudged to have committed any prior discriminatory housing practices is $10,000. *See* 42 U.S.C. §3612(g)(3); 24 CFR 104.910(b)(3). In the instant case, the secretary has asked for the imposition of civil penalties of $10,000 for the respondents' violation of 42 U.S.C. §3604(a) and $2,000 for the respondents' violation of 42 U.S.C. §3604(c).

Whereas some other federal statutes expressly require or permit the assessment of separate civil penalties for each violation of the act, the Fair Housing Act does not. *See, e.g.*, Federal Mine Safety and Health Act of 1977, 30 U.S.C. §820; Clean Air Act, 42 U.S.C. §7412(b). Thus, it can be seen that where Congress intended there to be multiple penalties for multiple violations of an act, it specifically so stated in the act. Therefore, even though nothing in the Fair Housing Act precludes the assessment of multiple penalties, I conclude that, with respect to a first judgment of housing discrimination under the Fair Housing Act, the offender cannot be penalized more than $10,000. "To hold otherwise would frustrate the clear limit intended by Congress ..." *HUD v. Simpson*, HUDALJ 04-92-0708-8 at p. 24 (Sept. 9, 1994). Therefore, in this case, the maximum possible civil penalty that may be imposed upon the respondents is $10,000 for both violations of the Act.

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[15] In *HUD v. Jeffre*, Fair Housing - Fair Lending (P-H), ¶25,020 (HUDALJ 1991), I made an additional award for the emotional distress suffered by the minor child in a familial status discrimination context. I did the same in *HUD v. Frisbee*, Fair Housing - Fair Lending (P-H), ¶25, 030 (HUDALJ 1992). However, in the instant case, the award of damages for intangibles was discussed and has been awarded in the context of the whole Nymoen family.

In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

Respondents' refusal to rent to the Nymoens was absolute; without any willingness to discuss the couple's qualifications. It was a frustrating and hurtful way for the Nymoens to be treated. It persisted after a more than adequate warning from the real estate agents that it was probably illegal to refuse to rent to the Nymoens based upon the occupancy standard they had imposed for the subject dwelling.

While the Respondents only became citizens of the United States in 1992, they are not new to the rental industry in this country. They have been renting houses in the U.S. for 28 years and should therefore be familiar with the dynamics of the U.S. legal system and the fact that it imposes restrictions on the choices open to landlords. (T 402). Moreover, the Pfaffs are not unsophisticated individuals, incapable of understanding the law. On the contrary, they struck me as extremely sophisticated and comprehending, but stubborn in their views.

The Pfaffs immigrated to Canada after World War II with "... two children, six suitcases, and $42." They at first lived in a rented room, which Mr. Pfaff did not consider "unreasonable." (T 317-18). Through hard work and shrewd financial decisions they now own eight single family dwellings for rent that are worth well over $1 million. While one may sympathize with the difficult times the Pfaffs had getting a new life started on this continent, it strikes one as shocking, for that very reason, that they would treat the Nymoens with so little consideration. Moreover, as was stated in *HUD v. Sams*, Fair Housing - Fair Lending (P-H), ¶25,069 at p. 25,650 (HUDALJ Mar. 11, 1994):

> The Act is designed to vindicate the rights of people who have been denied housing for unlawful reasons, not to overlook discrimination because of the housing provider's sympathetic or benign circumstances.

Bellingham is a relatively small community. (T 273). Two of its property management firms were involved in this case. Thus, it is reasonable to conclude that the outcome of this matter will be shared within the property management and rental industry community of Bellingham and its surrounding areas. The imposition of a large penalty will not only serve to deter the Pfaffs from acting again in the manner that they did in this case, but it should also serve to deter the other landlords who provide housing in the area.

Respondents' financial circumstances suggest that only the imposition of a large civil penalty for the violation they committed could have a significant impact on their overall financial status. The Pfaffs' net worth is well over a million dollars. (T 411). Only if the penalty for their actions makes a significant dent in this figure can it be believed that the imposition of a penalty will reenforce the significance of the Act's prohibition against familial status discrimination.

Thus, the only factor mandated by Congress for consideration when imposing a civil penalty, that militates against imposition of the maximum penalty, is that the Pfaffs have not been previously judged in violation of the Act. Consideration of all the others points the way to a major penalty. However, I am reluctant to impose the lawful maximum since it is not hard to imagine cases even more egregious than this one. *See, e.g., Blackwell, supra*; *see also, HUD v. Edith Johnson*, (HUDALJ 06-93-1262 and 1316-8, June 26, 1994). Accordingly, a civil penalty of $8,000 will be imposed in the Order at the end of this initial decision.

Injunctive Relief

Section 812(g)(3) of the Fair Housing Act also authorizes the administrative law judge to order injunctive or other equitable relief to make the complainant whole and to protect the public interest in fair housing. "Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Blackwell II*, at 874 (quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983)).

The purposes of injunctive relief in housing discrimination cases include the elimination of the effects of past discrimination, the prevention of future discrimination, and the positioning of the aggrieved persons as close as possible to the situation they would have been in but for the discrimination. *See, Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he has "the power as well as the duty to use any available remedy to make good the wrong done." *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (citation omitted).

Here, the removal of the effects of the past discrimination would be too disruptive. Another family, innocent of any wrongdoing in this case, now lives in the subject dwelling. It would be unfair to now force that family to move to another house. It is not even clear that the Nymoens would choose at this time to move again. Thus, the subject dwelling will not be ordered to be made available to the Nymoens.

However, it is appropriate to ensure that the respondents cease certain activities and undertake certain other actions so long as they continue to rent housing. Therefore, a number of specific provisions of injunctive relief are set forth in the Order issued below.

Order

Having concluded that Respondents Pfaff violated the Fair Housing Act by discriminating against Complainants Nymoen on the basis of familial status, it is hereby

ORDERED that,

1. Respondents are permanently enjoined from discriminating against the Complainants, Michael and Becky Nymoen and their children, or any member of their families, and from retaliating against or otherwise harassing Complainants or any member of their families. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 CFR Part 100(1989).

2. Respondents shall institute record keeping of the operation of all of their rental properties, owned or otherwise controlled by the Respondents within the jurisdiction of HUD's Seattle Office, which are adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph 3 of this Order. Respondents shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.

3. On the last day of every third month beginning December 31, 1994, and continuing for three years, Respondents shall submit reports containing the following information regarding the previous three months, for all properties owned or otherwise controlled by the Respondents within the jurisdiction of HUD's Seattle Office, to HUD's Regional Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Seattle Federal Office Building, 909 First Avenue, Suite 200, 10G, Seattle, Washington 98102-1000, provided that the director of that office may modify this paragraph of this Order as deemed necessary to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and written description of every

oral application, for all persons who applied for occupancy of all

Respondents' properties effected by this Order, including a statement of the person's familial status, whether the person was accepted or rejected, the date of such action, and, if rejected, the reason for the rejection;

b. a list of vacancies at all Respondents' properties effected by this Order including each departed tenant's familial status, the date of termination notification, the date moved out, the date the unit was next committed to rental, the familial status of the new tenant, and the date that the new tenant moved in;

c. current occupancy statistics indicating which of the Respondents' properties are occupied by families with children;

d. sample copies of advertisements published or posted during the reporting period, including dates and what, if any, media was used, or a statement that no advertising was conducted;

e. a list of all persons who inquired in any manner about renting one of Respondents' units, including their names, addresses, familial status, and the dates and dispositions of their inquiries; and

f. a description of any rules, regulations, leases, occupancy standards, or other documents, or changes thereto, provided to or signed by any tenants or applicants.

4. Respondents shall inform all their agents and employees of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing act.

5. Within 30 days of the date this Initial Decision and Order is issued, the respondents shall pay damages in the amount of $24,212.61 to Complainants to compensate them for their losses that resulted from Respondents' discriminatory activity.

6. Within 30 days of the date this Initial Decision and Order is issued, the respondents shall pay a civil penalty of $8,000 to the Secretary, United States Department of Housing and Urban Development.

7. Within 30 days of the date that this Initial Decision and Order is issued, the respondents shall submit a report to HUD's Seattle Regional Office of Fair Housing and Equal Opportunity that sets forth the steps they have taken to comply with the other provisions of this Order.

This Order is entered pursuant to 42 U.S.C. §3612(g)(3) of the Fair Housing Act and the regulations codified at 24 CFR 104.910, and will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the secretary within that time.

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ROBERT A. ANDRETTA
Administrative Law Judge

Dated: October 27, 1994.